

RICHARD C. NIELSON
(D/B/A NIELSON SAND AND ROCK)

IBLA 90-485, 92-63

Decided May 27, 1994

Consolidated appeals from decisions of the San Juan (Utah) Resource Area Office, Bureau of Land Management, assessing trespass damages. U-62417.

Affirmed in part as modified, reversed in part, and set aside in part and remanded.

1. Materials Act--Trespass: Generally

Where there is no substantial dispute that a purchaser of materials under a materials sale contract removed more bank material than the amount authorized by contract after the expiration date of that contract, an act of trespass has occurred and the unauthorized user is liable for damages to the United States. Where the purchaser has not effectively challenged BLM's computation of the volume removed in excess of the authorized amount, BLM's decision is properly affirmed. In the absence of controlling State law, the appropriate measure of damages is the in-place value of the material, as previously determined following hearing, in the absence of additional evidence showing that relevant circumstances have changed since the hearing date.

2. Appraisals--Materials Act--Trespass: Generally

An area-wide appraisal assigning a value to representative sand and gravel deposits located in a BLM resource area is a master appraisal. In appraisal cases where BLM attempts to implement the comparable use method of valuation by using a master appraisal, the Board seeks to determine whether the material subject to appraisal actually conforms to the representative material. It is improper for BLM to apply a master appraisal without making a thorough comparison of various factors considered in appraising the representative material, and a BLM decision using a master appraisal to establish value of materials is insufficient where the master appraisal acknowledges that there are significant potential differences in sand and gravel found in the resource area, the record fails to demonstrate any relationship between

the materials being appraised and the master appraisal, and there is no indication that the specific materials at issue matched the comparable factors identified in BLM's appraisal of the representative material.

3. Materials Act--Trespass: Generally

An assessment of damages for intentional trespass against the purchaser of sand and gravel under a materials sale contract because he processed and removed materials after expiration of the contract is properly reversed where the terms of the contract provide that title to the materials pass to the purchaser when he has paid for the materials and they are extracted, and those terms suggest that "removal" of materials after expiration of the contract is not trespass; where the contract does not expressly provide for reversion of title to the materials to the United States; and where the purchaser has in fact tendered payment and extracted the material.

4. Materials Act--Trespass: Generally

Extraction of sand and gravel bank material beyond amounts authorized by sales contract and after expiration thereof is intentional trespass where BLM repeatedly expressly warned that removal of material would constitute trespass. However, where the record is unclear as to how much material was removed, the decision setting damages is properly set aside and remanded for clarification.

APPEARANCES: L. Robert Anderson, Esq., Lyle R. Anderson, Esq., Monticello, Utah, for appellant.

OPINION BY ADMINISTRATIVE JUDGE HUGHES

Richard C. Nielson (doing business as Nielson Sand and Rock) (Nielson) has appealed from two decisions by the San Juan (Utah) Resource Area Office, Bureau of Land Management, assessing trespass damages for the unauthorized removal of sand and gravel.

On March 7, 1988, Nielson expressed a desire to purchase a total of 37,000 cubic yards (cy) of sand and gravel material over 5 years from the Bluff pit at \$0.35 per cy. ^{1/} BLM officials met with Nielson at the pit

^{1/} The Bluff pit is located in the SE¹/₄ NW¹/₄, sec. 28, T. 40 S., R. 22 E., Salt Lake Meridian, San Juan County, Utah. The history of the initial steps surrounding the contracts at issue here is set out in several staff reports, all dated Apr. 4, 1988, concerning various meetings between BLM and Nielson and associates.

on March 9, 1988, to establish the conditions and requirements for such sale. 2/ An area containing 2,700 cubic yards of material was flagged, as the first stage of what the parties evidently expected to be multiple sale contracts.

At that time, Nielson and BLM were engaged in administrative litigation over an earlier trespass action (UT-060-4-501) concerning Nielson's removal of material from the Bluff pit. 3/ That litigation concerned a contract for sale of 7,996 cy of gravel (UT-060-MPI-2) executed by Nielson and BLM on April 28, 1981. Under the terms of that contract, it did not expire until "the permitted yardage was recovered."

The original trespass action arose because, in 1983, BLM determined that Nielson had removed material in excess of the "permitted yardage." BLM notified Nielson in March 1984 that he was no longer authorized to continue to extract material and that he would have to pay for any material removed beyond the contract volume at a "penalty rate." Despite that warning, Nielson continued to extract material. In August 1984, BLM prepared an appraisal determining the fair market value (fmv) of the material. BLM surveyed the site in September 1984, to determine how much material had been removed, calculated that volume, and, in October 1984, issued a formal notice of trespass. BLM assessed treble damages, using an fmv of \$0.90 per cy, later reduced following negotiations to \$0.60 per cy. 4/ Nielson appealed BLM's demand for damages to this Board, and his appeal was docketed as Connie Nielson, IBLA 86-94.

That appeal was still pending on March 11, 1988, when BLM approved Nielson's request to purchase more material by signing the contract for the cash sale of 2,700 cy of mineral materials (U-62417) under authority of the Act of July 31, 1947, as amended (the Materials Act), 30 U.S.C. §§ 601 through 604 (1988). The contract contains a stipulation setting the price for the material at \$0.60 per cy, but providing that the price would be adjusted if this Board set a different price as a result of Nielson's then pending appeal, IBLA 86-94, and other relevant terms, discussed below.

When Nielson took contract U-62417, he indicated that he wanted to buy as much additional gravel as possible from BLM. On April 4, 1988, a representative of BLM indicated that Nielson could buy 100,000 cy of material in a year. As discussed below, BLM was unable to make good on that representation.

On May 6, 1988, we ruled in IBLA 86-94 that, because BLM's determination of fmv had been challenged and the record was unclear on how BLM

2/ To free the materials for sale, Nielson agreed to relinquish a mining claim he held that was found to enclose the gravel operation.

3/ The details of that litigation are set out in two previous Board opinions, Richard Connie Nielson v. BLM, 125 IBLA 353 (1993) (Nielson II), and Connie Nielson, 102 IBLA 195 (1988) (Nielson I).

4/ Nielson I, 102 IBLA at 196-97.

trespass volume, the matter should be referred to the Hearings Division for a factfinding hearing. Nielson I, 102 IBLA at 198-99.

Meanwhile, the record indicates that Nielson dug several test pits at the Bluff pit in April 1988 to determine the extent of gravel there. By June 1988, he had begun excavating the area as authorized by contract U-62417.

On June 12, 1988, BLM entered into another contract (U-62421) for the sale of material from the Bluff Pit pursuant to the Materials Act, specifying a quantity of 10,000 cy of materials at a total price of \$6,000. The expiration date of that contract was June 12, 1990. 5/

In September 1988, Nielsen tendered payment for purchase of yet more material from the Bluff pit. 6/ On September 30, 1988, BLM wrote to Nielson, refunding that money and advising him that it would not sell him additional material from the Bluff pit, as originally indicated. BLM noted that Nielson was using the material removed from the site for a Department of Energy (DOE) contract and that BLM is obligated to give the material to DOE free. Nielson, through counsel, objected to BLM's letter, but did not file an appeal. BLM solidified its position against granting further contracts, as set out in a letter to U.S. Representative Howard Nielson in January 1989. 7/ Thus, the two contracts for a total of 12,700 cy were evidently the only additional contracts that BLM issued to Nielson.

In April 1989, Administrative Law Judge Ramon M. Child, following a hearing in Trespass UT-060-4-501, concluded that 13,421 cy of gravel had been removed from the pit after expiration of the April 28, 1981, contract; that its fmV was \$0.35 per cubic yard; that removal of the gravel had been authorized by BLM, though not by contract; and that, because any trespass was at worst innocent and not willful, no damages would be assessed because the \$4,697.35 value of the gravel had been paid by Nielson on March 7, 1985. 8/ BLM appealed that determination to this Board, and its appeal was docketed as Richard Connie Nielson v. BLM, IBLA 89-623.

Meanwhile, the two contracts issued to Nielson neared their expiration dates. On February 2, 1990, BLM wrote to him as follows:

5/ The only documentation in the record is a copy of the first page of that contract. As the case record contains several references to it, we presume that it was duly executed by BLM.

6/ Nielson's counsel later indicated that Nielson submitted a check to BLM for \$5,200, representing 10 percent of the price for about 87,000 cy of material. He stated that the money was accepted by a BLM employee, who told Nielson they had a deal.

7/ BLM also apparently communicated directly to Nielson, but a copy of that letter is not in the record. As Nielson never appealed BLM's decision to return his check, the merits of that decision are not directly at issue in the instant appeals.

8/ Nielson II, 125 IBLA at 355.

According to our records, Nielson Sand and Rock holds one active contract [(U-62417) 9/] for mineral materials at the Bluff Community Pit. All other contracts in the area have either expired or have been depleted of material.

This letter serves as a reminder that mineral material sales contract [U-62417] will expire on March 10, 1990. Excavation of any remaining material under this contract must be completed before the March 10 expiration date. Beginning on the date of expiration you will have 45 days to remove all equipment and personal property from the area and complete the required reclamation work. This includes removal of all processed materials stockpiled under previous contracts.

BLM did not address the status of unprocessed materials extracted and stockpiled at the Bluff pit. BLM's letter also advised Nielson that, prior to future material sales, BLM would first explore the possibility of offering the material for competitive sale.

On March 16, 1990, BLM inspected the site, concluding:

The chief [purpose] of the inspection was to determine if stakes marking boundaries of the 10,000 cubic yard sale (U-62421- Contract) were still in place and verify Nielson's contention that they still had material under that contract. The site was examined carefully and no evidence of stakes [was] found. A rough calculation of the pit left by mining operations showed that approximately 10,000 cubic yards of material had been removed * * *. We concluded that with possible exception of waste pile all material had been removed under contract.

Material contract U-62417 expired on March 10, 1990. [T]his contract was for 2,700 cubic yards. BLM letter dated 2-2-90 [notified] Nielson of expiration date and [allowed] 45 days to remove equipment and "processed material." Stockpiles of unprocessed material remained onsite as well as equipment. Pit should be monitored closely and future removal would result in trespass.

On March 16, 1990, Nielson objected to BLM's February 2 notice, reminding BLM that there was another contract, viz. the contract dated June 12, 1988, for the sale of 10,000 cy of materials, which did not expire until June 12, 1990 (U-62421). 10/ He requested an extension of time of 90 days to complete removal of materials and reclamation of the site. Further, he

9/ The letter actually cites contract "U-6217," an obvious error. The letter elsewhere cites the proper number, U-62417.

10/ Nielson did not actually refer to the contract by that number, but the record indicates that BLM had so identified it.

noted that Section 14 of the February 2, 1988, contract (U-62417) allowed 12 months for removal of equipment and personal property from the site.

On March 29, 1990, BLM denied the request for extension as untimely under 43 CFR 3610.1-7, noting that it was filed after the expiration of that contract. BLM also ruled that Section 14 of contract U-62417 (establishing 12 months to remove "equipment, improvements, or other personal property") was contrary to 43 CFR 3602.3, which states that after the permit period expires, BLM may grant the permittee no more than 90 days to do so. BLM ruled that, due to the small size of the operation, 45 days was adequate time to remove property. BLM also advised Nielson that it would not be necessary to recontour the pit area or reseed.

BLM also dealt with contract U-62421 in that letter:

In our February 2, 1990 letter we were under the opinion you had depleted your material and did not consider any reject material remaining from operations under contract U-62421. Since the contract was for 10,000 cubic "bank" yards, any reject materials resulting from processing of the contracted volume is also the property of Nielson Sand and Rock until the contract period expires. Through volumetric calculations we concluded that the contracted volume had been excavated. This was verified in a telephone conversation on March 27, 1990 between [Richard C. Nielson and a BLM employee], in which [the former] stated that the entire 10,000 bank yards had been excavated and all that remained was 5/8"-minus reject material.

We have considered your request for a ninety-day extension of contract U-62421 to remove remaining materials and reclaim the site. [Y]our written request failed to show the need for an extension of time, as required by 43 CFR 3610.1-7. DOE proposes to include this area in its operations, as well, and would do the required reclamation. Therefore, reclamation on the part of Nielson Sand and Rock will consist of no more than removing the reject pile. We feel that there is ample time between now and June 12, 1990 to remove the remaining reject materials. Because of these reasons, no extension of time beyond the expiration date will be granted.

BLM further explained that, under 43 CFR 3601.1-2(a)(2), a permittee enjoys the right to use and occupy a site only when BLM determines such use and occupancy to be necessary for the fulfillment of the contract. In addition, BLM related its position that the regulations allow only a 90-day grace period after expiration of a contract to allow for removal of equipment and personal property, but not for further processing of material. BLM explained that, since all 10,000 cy of material authorized to be removed by contract U-62421 had in fact been removed, Nielson was "into this grace period." Accordingly, BLM advised Nielson that he must remove all equipment except that necessary to remove the reject stockpile by June 12, 1990.

BLM concluded its March 29, 1990, letter by warning Nielson that "further extraction or removal of mineral materials other than processed

material could constitute a willful trespass and/or theft of government property." This was Nielson's first notice that BLM might consider processing and removal of then stockpiled unprocessed materials from the pit as a trespass. No legal authority for the proposition was provided.

On April 26, 1990, the Moab, Utah, District Manager notified Nielson that the period for removal of equipment and personal property under contract U-62417 was being extended for an additional 45 days, until June 7, 1990. No other variances were allowed. No reference was made to the removal of stockpiled unprocessed materials.

A preliminary inspection of the Bluff pit on May 3, 1990, revealed that "there has been some and gravel removed from the site," but that "no new material has been crushed." According to a BLM memorandum:

The crusher had been set up since last inspection. Much of the pit-run piles in the area of the 2700 yard sale have been processed. Remaining material is piled next to the crusher feeder unit. Additional in-place material has been excavated since last inspection. The excavated area now extends to the intersection of the small dirt [access] to pit and the highway. In addition small amount of material has been removed at east side of pit near old trespass area.

[Nielson] is considered to be in trespass as the 90 day extension of contract was for removal of personal property & equipment not for further processing of material. In addition, my guess is that more than 2,700 cubic yards of material have been excavated. Approximately 30 photographs were taken. [11/ 5/8"-minus reject pile is still there although a portion has been hauled off.

On May 31, 1990, BLM surveyed the Bluff pit to estimate the volume of material removed under contract U-62317. Control points established by BLM in 1983 were relocated and surveyed, as well as a meander corner located near the pit. Readings were taken on the pit floor at the most recent excavations and along the perimeter of the pit. That survey confirmed that material in excess of the contract volume (2,700 cy) had been removed. On June 7, 1990, BLM prepared an initial report of unauthorized use, recommending an additional survey, which was conducted on June 14. Details of that survey, showing that a total of 5,292 cy of material had been removed, are included in the record.

On June 22, 1990, BLM met with Nielson's counsel. According to counsel's letter dated June 26, 1990, BLM had conceded at that meeting that Nielson would be permitted to keep his equipment on the property until March 11, 1991. However, it had become clear that BLM had adopted the position that material that had been extracted from the ground and stockpiled had reverted to the ownership of the United States. Counsel disputed that conclusion, noting that he had provided BLM with citations of authority for

11/ Those photographs are not in the record.

the proposition that the materials that had been extracted from the ground had become Nielson's "personal property," so that he could haul it away any time before March 11, 1991. ^{12/} BLM, by letter of July 9, 1990, specifically confirmed that BLM did consider all material stockpiled on the site to be the property of the United States, citing 43 CFR 3602.3.

In the meantime, on June 29, 1990, BLM issued Bill for Collection A 386947, seeking \$1,555.20 for unauthorized removal of sand and gravel, representing 2,592 cy of material at \$.60 per cy. On July 2, 1990, BLM issued Trespass Notice UT-060-4-738, setting out the basis for the Bill for Collection. BLM notified Nielson that sand and gravel excavation had continued after expiration of contract U-62417, and that excavated volume exceeded contract volume by 2,592 cy. Nielson was also notified that operations constituted unauthorized use under 43 CFR 3603.1, and that further removal of material would constitute a willful trespass. However, BLM only billed Nielson for the actual value of the material, as then computed by BLM, thus assessing damages for non-willful trespass.

On July 31, 1990, Nielson filed a timely appeal of the Bill for Collection and Trespass Notice. On August 8, 1990, BLM amended its decision to correct a mathematical error, reducing the amount of material taken in trespass to 2,583 cy. Nielson's appeal was docketed as Nielson Sand and Rock, IBLA 90-485. That appeal is addressed herein.

On August 6, 1990, Nielson, through counsel, tendered a check of \$1,555.20 to BLM. On August 28, 1990, BLM returned that check, stating that, "[s]ince you have appealed trespass notice UT-060-4-738 and intend to pursue this appeal, it is inappropriate to pay for the material in dispute at this point in time." BLM also notified Nielson that, under 43 CFR 9239.0-9(b)(3), it would refuse to sell Nielson any additional material until a bond was posted covering liability (\$19,460.45) for Trespass UT-060-4-501 (then under appeal in Richard Connie Nielson v. BLM, IBLA 89-623), liability (\$1,555.20) for Trespass UT-060-4-738 (then under appeal in Nielson Stone and Rock, IBLA 90-485), and Nielson's outstanding reclamation responsibility (\$14,900) at the Bluff pit, as well as a performance bond of 20 percent of the total contract value of any new contract.

Nielson continued to process stockpiles of previously extracted material and remove it from the Bluff pit. On August 20, 1990, an inspection of the pit revealed that pit-run material stockpiled at the pit had been processed and removed from the pit. BLM's "compliance check" document states that "[p]it-run material which was piled in the pit has been crushed and processed since" the inspector's last inspection on July 19, 1990, and "a portion of the 'washed' sand has been removed." Other evidence in the record establishes that, between May and December 1990, Nielson processed and removed pit-run material that had been mined and stockpiled at the pit.

^{12/} The record does not contain such.

In September 1990, BLM estimated the amount of material stockpiled at the site.

Nielson also continued to extract additional mineral material from the pit. A BLM compliance check form for an inspection on December 12, 1990, indicates that 190 cy of material had been

severed from the bank immediately west of the crusher-feeder unit. After examining the material in cross-section, it was determined that the material being excavated was in situ as naturally deposited and not pit-run. * * * A tape was used to take measurements of the excavated area. Calculations were done which showed that approximately 190 [cy] of material has been severed from the bank.

That fact is corroborated by photographs of the area taken on November 11, 1990. Vehicle tracks in the area showed that the material had been removed and hauled to Nielson's processing operations.

In March 1991, BLM reported that activities in the Bluff pit had virtually ceased. BLM estimated that an additional 30 cy of bank material "was taken from the slough at the base of the northern bank." No evidence corroborating that report is in the record.

In August 1991, BLM surveyed the stockpiles, based on information assembled in March 1991. There is little supporting evidence in the record concerning that survey or the information assembled in March as to how much additional bank material was extracted.

On September 23, 1991, BLM sent Nielson Trespass Notice UT-060-4-786 alleging unauthorized removal of sand and gravel. Bill for Collection No. A 386969 specified that 1,083 cy of sand and gravel had been removed and assessed a "penalty for willful trespass" at triple the appraised value of \$0.75 per cy, or \$2.25 per cy. Nielson filed a timely notice of appeal, and the appeal was docketed as Richard C. Nielson, IBLA 92-63. That appeal is also addressed herein.

On March 3, 1993, we issued our decision in Richard Connie Nielson v. BLM, IBLA 89-623, which reversed Judge Child's holding that no trespass had occurred, holding instead that an innocent trespass had occurred, and affirmed his determination that fmv was \$0.35 per cy, the "in place value of the material removed." Nielson II, 125 IBLA at 368.

[1] Turning to the instant appeals, we first address BLM's decisions of June 29 and July 2, 1990, assessing damages for unintentional trespass. There is no substantial dispute that a trespass occurred when Nielson removed more bank material than the amount authorized by contract, after the termination date set therein. Unauthorized removal of mineral materials from public lands is unauthorized use and an act of trespass, and unauthorized users (trespassers) are liable for damages to the United States. 43 CFR 3603.1 and 9239.0-7; Nielson II, 125 IBLA at 363. Those regulations

prohibit the removal of mineral materials except when authorized by a sale or permit issued under the Materials Act and Departmental regulations. Nielson II, 124 IBLA at 363, and cases cited.

Nielson has not effectively challenged BLM's computation of the volume removed in excess of the authorized amount. The burden is on Nielson, as the party challenging BLM's decision, both to show adequate reason for appeal and, as appropriate, to support his allegations with evidence showing error. Conclusory allegations of error or differences of opinion, standing alone, do not suffice. King's Meadow Ranches, 126 IBLA 339, 342 (1993); Glanville Farms v. BLM, 122 IBLA 77, 85 (1992). BLM's decision is adequately supported by evidence demonstrating the volume of material removed, and Nielson has not shown error in BLM's calculations.

Further, BLM determined that the removal of those materials was an innocent trespass. We previously affirmed BLM's adoption of in-place value of material removed as the measure of damages for innocent trespass. We determined that value to be \$0.35 per cy for material from the Bluff pit as of 1981. See Nielson II, 125 IBLA at 358-61, 368. We acknowledge that the determination of in-place value relies on several factors, including data reflecting market conditions prevailing at the time of removal. However, BLM has not, following our decision in Nielson II, submitted evidence establishing that those conditions were different between the first trespass and the present appeal.

[2] BLM did include in the record an "areawide appraisal for sand and gravel deposits located in the San Juan Resource Area," which sets a "final estimate of value" of \$0.75 per cy for "higher quality San Juan River deposits." That document concludes:

[T]wo distinctive types of sand and gravel occur in the Resource Area[,] indicating the need for different prices. Sales of the lower quality material range from [\$.30] to \$1.00 per cy. * * * The higher quality San Juan River deposit is represented in sale Nos. 6 to 8 but varying situations exist in these sales that need consideration.

Nothing in the record specifically compares the Bluff pit material to the material identified in the area-wide appraisal.

An appraisal of this type, determining the fmv of representative material, rather than material from a specific site, is properly termed a "master appraisal." The preferred method for appraising fair market value is the comparable lease method where there is sufficient comparable data and appropriate adjustments are made for the differences between the subject of the appraisals and other similar materials. See Oregon Broadcasting Co., 119 IBLA 241, 243 (1991), and cases cited. In appraisal cases where BLM attempts to implement the comparable use method of valuation by using a master appraisal, the Board seeks to determine whether the material subject to appraisal actually conforms to the representative material. See Union Pacific Railroad Co., 114 IBLA 399, 403 (1990). It is not proper for BLM

to apply a master appraisal without making a thorough comparison of various factors considered in appraising the representative material. A BLM decision using a master appraisal to establish value of materials is insufficient where the record fails to demonstrate any relationship between the materials being appraised and the master appraisal, and where there is no indication that the specific materials at issue matched the comparable factors identified in BLM's appraisal of the representative material. See Confidential Communications Co., 126 IBLA 349, 351 (1993).

BLM's area-wide appraisal acknowledges that there are significant potential differences in sand and gravel found in the San Juan area.

No effort has been made to consider those differences, and we therefore cannot apply the fmv established by the area-wide appraisal to the Bluff

pit material. In the absence of any evidence indicating that it is not applicable, we instead accept \$0.35 per cy as the in-place value of the material removed in trespass. BLM's June 29 and July 2, 1990, decisions assessing damages for innocent trespass are accordingly affirmed, as modified to reflect a measure of damages of \$0.35 per cy. 13/

More difficult questions surround BLM's September 23, 1991, decision assessing treble damages for alleged willful trespass. Two different sets of circumstances are presented.

[3] First, BLM has assessed intentional trespass damages against Nielson for processing and removing from the Bluff pit area (at a time after expiration of the materials sales contracts) material mined either under authority of contract or in innocent trespass and stockpiled there.

Appellant has argued that BLM may not properly assess trespass charges against him beyond those already assessed for his removal of the stockpiled material. Nielson has already paid for all of the stockpiled material, either pursuant to the terms of the sales contracts or by paying appropriate trespass damages. 14/ Appellant submits that to charge him any additional damages for trespass for removal of stockpiled material is unsupportable, as he has already paid for that material.

13/ We would note additionally that BLM would have been justified in demanding damages for intentional trespass here. A person cited for a previous similar trespass for which he paid damages may properly be deemed to be a willful trespasser. Mountain States Telephone & Telegraph Co., 34 IBLA 154 (1978). Further the terms of the contract, at Section 3, seem crystal clear that extracting mineral after the expiration date of the contract is an intentional trespass. However, we are generally reluctant to second-guess a BLM decision to impose damages for innocent, rather than intentional, trespass. See, generally, Glanville Farms v. BLM, supra.

14/ Nor can Nielson be faulted because he has not, as of this date, actually paid those damages. He tendered the full amount demanded by BLM for unintentional trespass damages on Aug. 6, 1990, but BLM refused to accept it.

In any event, the effect of BLM's demand for trespass damages was suspended pending appeal by 43 CFR 4.415 (1990).

The basis for BLM's decision to assess intentional trespass damages is that title to the material was retained by the United States or somehow reverted to it upon expiration of the sales contract. However, Section 5 of the sales contract expressly provides that "[t]itle to mineral materials sold under this contract shall remain in the Government and shall not pass to Purchaser until such material has been paid for and extracted" (emphasis supplied). No provision is made for reversion of title. Thus, Nielson gained title to the material when the material was both extracted and paid for. With the exception only of additional bank material removed after June 1990 (discussed separately below), the material here was both extracted and paid for no later than August 6, 1990, when Nielson tendered payment of innocent trespass damages to BLM. 15/

Less certain is whether Nielson enjoyed the right to stay at the pit and process his extracted materials after the expiration date of the contract. Section 14 establishes a 12-month period "after the time for extraction and removal of minerals" to remove "equipment, improvements, or other personal property." The fact that that period commences only after the expiration of the time for "extraction and removal of minerals" suggests that the contract expiration date was also the deadline for "removal of minerals." Nevertheless, there must have been some purpose in establishing a 12-month period to retain equipment on the site. It would not be unreasonable to find that BLM expected the purchaser to continue processing bank materials after the expiration date of the contract and authorized him to keep his equipment, including crushers, loaders, etc., on the site in order to be able to do so.

Further, another contract provision strongly suggests that it was not trespass for the purchaser merely to "remove" mineral material from the pit. Section 10(b) provides that a trespass occurs only if "the Purchaser extracts" mineral materials "after expiration of the time for extraction or the cancellation of" the contract (emphasis supplied). Section 10(b) distinguishes that situation from the one where the contract is suspended for violations of the terms of the contract, in which case the purchaser may not "extract or remove any mineral materials" (emphasis supplied). 16/ Thus, "extraction" of minerals after contract expiration is trespass; mere "removal" of minerals is not (except where the contract has been suspended for violations).

In view of this ambiguity in contract terms, we cannot affirm an assessment of punitive damages for intentional trespass on account of Nielson's continued processing and removal of extracted materials after

15/ BLM should now collect those damages, if it has not already done so.

16/ A suspension of the contract would normally occur when a lessee's operations (including both extraction and removal) violate restrictions imposed by the lease. In such case, it would be appropriate to bar both extraction and removal, on pain of trespassing proceedings.

the expiration of the sale contract, as advanced by BLM. A trespass certainly did occur when Nielson extracted materials substantially in excess of the amount authorized by contract after its expiration date. As noted above, BLM could have elected to consider that action an intentional trespass and seek punitive damages, but did not. By instead charging Nielson with damages constituting the in-place value of the excess mineral material, BLM in effect allowed title to that material to pass to Nielson and authorized him to remove it. The Government was made whole for the loss of its material when Nielson tendered the prescribed damages, representing the in-place value of the materials. Insofar as BLM's decision held that processing and removal of materials extracted and paid for by Nielson was an intentional trespass and assessed additional damages, it is reversed.

[4] Other circumstances are present. The record demonstrates that additional bank material was extracted from the Bluff pit in November 1990. That material was plainly taken after all contracts for sale had expired, despite BLM's repeated, express warnings that extraction of material would constitute trespass. Under Section 10(b) of BLM's sales contract form, "[i]f Purchaser extracts any" mineral materials "after expiration of the time for extraction or the cancellation of this contract, such extraction * * * shall be considered a willful trespass and render Purchaser liable for triple damages." ^{17/}

The present circumstances are different, in a critical way, from those we considered in Nielson II. There, no specific termination date was provided by the contract; instead, it expired "when the permitted yardage was recovered," a fact that was subject to disagreement and prolonged uncertainty. By contrast, in the instant case, both contracts expired, by their own express terms, 2 years after issuance. Thus, the latest date that materials could be extracted under authority of those contracts was June 12, 1990.

Thus, to the extent additional material beyond that considered in the June 1990 notice of trespass was extracted by Nielson, an intentional trespass occurred. However, we are unable to determine with any certainty the amount of material extracted, as the present record does not clearly delineate the amount of bank material extracted after June 1990. In these circumstances, we deem it appropriate to set aside BLM's September 1991 decision and remand the matter for BLM to identify more precisely the amount of material extracted (as opposed to processed and removed) from the Bluff pit by Nielson after BLM's June 1990 trespass assessment. BLM may then issue a decision demanding appropriate damages for intentional trespass for that amount. Its decision shall be subject to appeal.

^{17/} The provision actually states, "such extraction or removal shall be considered a willful trespass." The inclusion of "or removal" was intended to cover the circumstances (not present here) where a purchaser continued to remove materials while the contract was suspended for violations of its terms. As discussed above, after expiration of the contract, only extraction of materials is deemed trespass.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed in part, reversed in part, set aside in part, and remanded.

David L. Hughes
Administrative Judge

I concur:

James L. Byrnes
Chief Administrative Judge

